# ORIGINAL

Supreme Court, U.S.
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No. 02-30

IN THE
SUPREME COURT OF THE UNITED STATES

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TERRY L. STEWART,
PETITIONER/CROSS-RESPONDENT,

-vs-

ANTHONY MARSHALL SPEARS,
RESPONDENT/CROSS-PETITIONER.

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**PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT**

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**REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED FOR REVIEW

**Question presented in Petition:**

The Ninth Circuit Court of Appeals panel unanimously held that, as of July 17, 1998, Arizona's amended procedures governing the appointment and compensation of post-conviction relief (PCR) counsel to indigent capital defendants satisfies the requirements to "opt in" to the expedited federal habeas procedures in Chapter 154 of the AEDPA. The Court refused to allow Arizona to enforce the expedited habeas procedures in Spears' case, however, because Arizona did not apply its normal procedure governing the timing of appointment of PCR counsel and there was a delay in appointing PCR counsel to Spears. Given that Spears never alleged or proved prejudice resulting from the delay in appointment, did the Ninth Circuit err in concluding that Arizona should be denied the *quid pro quo* benefits promised by Congress and precluded from enforcing the provisions in Chapter 154?

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## REASONS WHY THE WRIT SHOULD ISSUE ON PETITIONER'S QUESTION PRESENTED

The question presented in the Petition is an important one: given that the vast majority of the 37 states that have the death penalty are expending considerable resources amending their systems for the appointment of post-conviction counsel, this Court must delineate the circumstances under which a state will be allowed to enforce Chapter 154 and obtain the *quid pro quo* benefit promised by Congress. With many states having already attempted to opt into Chapter 154, Spears' case is the first and only one in which a circuit court has found that a state's efforts have been successful. That finding, that Arizona's amended system facially complies with Chapter 154, is unchallenged by Respondent in the Conditional Cross-Petition. The Ninth Circuit panel denied Arizona the benefits of Chapter 154 only after misinterpreting state law and divining a congressional intent in Chapter 154 of immediate appointment of PCR counsel where none exists.

In a sophomoric attempt at avoiding the heart of the issue presented in the Petition, Spears first argues that the "question presented" in the Petition means something less than what it says. Myopically focusing on only the final sentence in the question presented, which questions whether "the Ninth Circuit err[ed] in concluding that Arizona should be denied the *quid pro quo* benefits promised by Congress and precluded from enforcing the provisions in Chapter 154," he argues that the question whether Chapter 154 and state law require the immediate appointment of PCR counsel has not actually been presented to this Court. To the contrary, however, the Petition presents this Court with the question that death penalty states and every circuit court are waiting for this Court to answer: does a delay in appointing PCR counsel, a delay that is allowed under state law and has *not* been shown to prejudice the defendant, preclude the state from enforcing Chapter 154?

Hoping that simply saying it will make it true, Spears next argues that Arizona law governing the appointment of PCR counsel has changed so much since Spears was appointed counsel that the Ninth Circuit's opinion really only "effects [sic] comparatively few capital defendants." (Opposition at 8.) To the contrary, the sole provision that has changed from those applied in Spears's case was amended to the benefit of capital defendants to allow *earlier*, pre-mandate appointment of PCR counsel in capital cases. Thus, the amended provision is even *more* in compliance with the requirements of Chapter 154, not less, and it will not render an opinion in Spears' case inapplicable to subsequent cases.

Finally, Spears misapprehends both state and federal law and its consequences. Although the Ninth Circuit was never called upon to address the state law governing the withholding of the mandate (because Spears never challenged those state law provisions), the fact is that Rule 31.20, Arizona Rules of Criminal Procedure, gives the Arizona Supreme Court the *express* authority to delay the issuance of the mandate until PCR counsel becomes available. This Court is in no way called upon to interpret this provision of state law.

**A. The question presented in the Petition includes the question whether applicable state law and Chapter 154 require PCR counsel to be appointed immediately.**

This Court's Rule 14(1)(a) requires the question presented for review in a petition for writ of certiorari to "be expressed concisely in relation to the circumstances of the case, without unnecessary detail," and "be short and should not be argumentative or repetitive." The Rule also provides, "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. R. 14(1)(a). The question presented in the Petition is as follows:

> The Ninth Circuit Court of Appeals panel unanimously held that, as of July 17, 1998, Arizona's amended procedures governing the appointment and compensation of post-conviction relief (PCR) counsel to indigent capital defendants satisfies the requirements to "opt in" to the expedited federal habeas procedures in Chapter 154 of the AEDPA. The Court refused to allow Arizona to enforce the expedited habeas procedures in Spears' case, however, because Arizona did not apply its normal procedure governing the timing of appointment of PCR counsel and there was a delay in appointing PCR counsel to Spears. Given that Spears never alleged or proved prejudice resulting from the delay in appointment, did the Ninth Circuit err in concluding that Arizona should be denied the *quid pro quo* benefits promised by Congress and precluded from enforcing the provisions in Chapter 154?

Spears seems to agree that the question concerning Arizona's compliance with its appointment procedures and the question whether Chapter 154 requires the immediate appointment of PCR counsel are very important; he argues, however, that the question presented above raises only the issue of prejudice and nowhere even "suggests" that Petitioner is raising the former issues. The question of prejudice, alone, Spears argues is "comparatively unimportant." (Opposition at 6, 8.)

No interpretation of the question presented could yield the result that Petitioner suggests. A reasonable reading of the entire paragraph shows that the final clause, which inquires whether the Ninth Circuit erred in precluding the state from enforcing Chapter 154, necessarily encompasses the question whether state and federal law *per se* require the immediate appointment of PCR counsel before a state will be allowed to enforce Chapter 154 or instead require a capital defendant to show prejudice resulting from a delay in appointment before the state is precluded from enforcing Chapter 154.

Spears authority supports this interpretation by demonstrating that only questions that are very different and separate from those raised will be found not to comply with Rule 14(a)(1). In *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corporation,* cited by Spears for the proposition that issues are not properly before the Court simply because they

Second, the importance of this case as the first in the nation to find the opt-in requirements satisfied is very apparent under any interpretation of the question presented.

**B. The relevant state law provisions are still in effect; thus, review of Spears' case is not fruitless.**

Mimicking Judge Reinhardt's dissent from the denial of en banc review, Spears next argues that review is not worthwhile because Arizona's mechanism has substantially changed. In support of this argument, Spears points to *one provision* in the multiple provisions governing the appointment of PCR counsel. When Spears was appointed counsel, Rule 32.4(c), Arizona Rules of Criminal Procedure, provided for the appointment of PCR counsel within 15 days after the notice of post-conviction relief is filed. This provision has been amended to now provide for the appointment of PCR counsel after the Arizona Supreme Court affirms the defendant's conviction and sentence, rather than after the notice of post-conviction relief is filed. Ariz. R. Crim. P. 32.4(c) (eff. June 1, 2002).[1]

Petitioner claims that there is now no express requirement that counsel must be appointed timely, and thus, Arizona's system is not even facially valid after June 1, 2002. This argument demonstrates a fundamental misunderstanding of Arizona's appointment mechanism. In Arizona, the issuance of the mandate triggers the post-conviction relief process: a notice of post-conviction relief is filed and, under the former Rule 32.4(c), PCR counsel was appointed within 15 days of that notice. The issuance of the mandate, in turn, occurs only *after* this Court has denied certiorari review of the Arizona Supreme Court's decision or the time for seeking certiorari review has expired. Ariz. R. Crim. P. 31.23(b)(1).

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1. For a short time prior to the current amendment, the rule provided for the appointment of PCR counsel "upon" the filing of the notice of post-conviction relief, without specifying a time frame. Former Ariz. R. Crim. P. 32.4(c) (eff. Dec. 1, 2002). That formulation of the Rule does not affect this analysis, however, because PCR counsel has consistently been appointed on the same day that the mandate is issued.

The amendment to Rule 32.4(c) allows for the appointment of PCR counsel *prior to* the issuance of the mandate, while the case is either pending certiorari review or the time for certiorari review is expiring. Thus, PCR counsel may now have the opportunity to begin work on the case 90 days *prior to* the filing of the notice of post-conviction relief.

This benefits capital defendants under both state and federal law. The state PCR rules require that the PCR petition must be filed within 120 days of the notice of post-conviction relief. Ariz. R. Crim. P. 32.4(c)(1). Under the amended provision, if counsel is appointed, for example, 30 days after the Arizona Supreme Court's opinion affirming the conviction and sentence, then counsel may have an additional 60 days (for the 90-day time for certiorari to expire if appellate counsel decides not to seek review) or even substantially more time (if appellate counsel seeks certiorari review on the 90th day) to begin working on the case prior to the issuance of the mandate and the commencement of the PCR proceedings. Thus, this amendment is to the *benefit* of capital defendants and is even *more* in compliance with the requirements of Chapter 154 than the former 15-day rule.

Likewise, the amendment allowing the pre-mandate appointment of PCR counsel necessarily also makes it easier for PCR counsel to comply with the 180-day statute of limitations in Chapter 154, 28 U.S.C.A. § 2263. The 180-day period begins to run upon the issuance of the mandate and, under the State's position, is tolled when the PCR *petition* is filed, as opposed to when the *notice* of post-conviction relief is filed. *See* Kent E. Cattani, Monica B. Klapper, Representing the Indigent—*Spears v. Stewart* in Capital Cases, 38 Arizona Attorney 36, 42 (February 2002). Thus, the earlier the appointment of PCR counsel, the less likely it is that counsel will believe the 180-day period is too restrictive.

**C. This case does not require this Court to resolve a question of state law.**

Spears is incorrect when he argues that this case requires a resolution of state law. Rule 31.20, Arizona Rules of Criminal Procedure, expressly allows the Arizona Supreme Court to suspend Rule 31.23's provisions governing the issuance of the mandate in the exceptional circumstances in this case. There is no interpretation of a state law question in this case, nor is the concept of "inherent authority" implicated in this case.

The Arizona Supreme Court acted under the *express* authority of its own rules, rendering irrelevant and unnecessary the question whether it had the "inherent authority" to suspend the rules. *See State v. Sanchez*, 155 Ariz. 544, 545, 747 P.2d 1243, 1244 (Ct. App. 1987) (applying Rule 31.20 to suspend time limit for filing appellate brief). The court never specifically invoked its inherent authority or proffered any justification for doing so. *See Acker v. Chevira*, 188 Ariz. 252, 254–56, 934 P.2d 816, 818–20 (Ct. App. 1997) (detailed findings justifying invoking inherent authority generally required).

Moreover, evaluating the Arizona Supreme Court's suspension of the mandate under Rule 31.20 for purposes of satisfying the requirements in Chapter 154 is no more a question of state law than is the evaluation of the other criminal rules and statutes that constitute Arizona's system for the appointment of PCR counsel for Chapter 154 compliance. Thus, this case is not dependant upon this Court resolving questions of state law.

## CONCLUSION

Based on the foregoing authorities and arguments, respectfully requests this Court to grant Petitioner's request for certiorari review.

Respectfully submitted,

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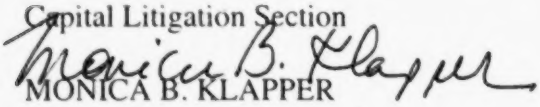

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